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## Markets and Morals: The Limits of Doux Commerce

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# MARKETS AND MORALS: THE LIMITS OF *DOUX COMMERCE*

MARK L. MOVSESIAN\*

## ABSTRACT

*In this Essay on Professor Oman's beautifully written and meticulously researched book, The Dignity of Commerce, I do three things. First, I describe what I take to be the central message of the book, namely, that markets promote liberal values of tolerance, pluralism, and cooperation among rival, even hostile groups. Second, I show how Oman's argument draws from a line of political and economic thought that dates to the Enlightenment, the so-called doux commerce thesis of thinkers like Montesquieu and Adam Smith. Finally, I discuss what I consider the most penetrating criticism of that thesis, Edmund Burke's critique from tradition, which suggests we should be careful attributing too much to markets' ability to promote liberal pluralism. According to Burke, it is the Western tradition, not commerce, which creates the tolerant, pluralist marketplace of the doux commerce thesis. That Burke was correct is suggested by several historical examples and by contemporary events in the United States and across the globe. That is not to say that Oman is entirely wrong about the potential political benefits of the market, only that we should be careful not to overstate them.*

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## INTRODUCTION

I thank the William & Mary Center for the Study of Law and Markets for inviting me to participate in this symposium on Professor Oman's new book, *The Dignity of Commerce*.<sup>1</sup> Oman has written a wonderful book in the great tradition of American contracts jurisprudence. He combines immense learning and sophistication with a lightness of touch that makes the book a pleasure to read. I do not know other contracts scholarship that manages to address, in turn, *The Merchant of Venice*,<sup>2</sup> colonial India,<sup>3</sup> the *Histories* of Herodotus,<sup>4</sup> the Cairo Geniza,<sup>5</sup> the Pukhtun tribes of Pakistan,<sup>6</sup> and Kaldor-Hicks "efficiency!"<sup>7</sup> This meticulously researched, thoughtful, and beautifully written book will make an enduring contribution to American contracts learning.

I agree with Oman about many things. I agree, for example, that markets are beneficial, and that contracts and contract law are valuable aspects of a well-functioning society. I agree, too, that trade promotes wealth, social development, and even, occasionally, a benign indifference to certain divisive issues. Nonetheless, I find myself disagreeing with Oman's central claim about the political benefits of markets. It is a friendly disagreement; in the end, it may amount to little more than a difference in emphasis. But it seems to me an important one. I am much more skeptical than Oman that commerce can have the beneficial political effects he identifies.

In this Essay, I will do three things. First, I will describe what I take to be the central argument of *The Dignity of Commerce*, namely, that markets have moral worth because they promote the liberal values of tolerance, cooperation, and pluralism.<sup>8</sup> Second, I will show that Oman's argument draws on a line of thought that dates back to the Enlightenment, the so-called *doux commerce* thesis of thinkers like Montesquieu and Smith.<sup>9</sup> Finally, I will address what I

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<sup>1</sup> NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016).

<sup>2</sup> See generally *id.* at 1–8, 183.

<sup>3</sup> *Id.* at 29.

<sup>4</sup> *Id.* at 34–35.

<sup>5</sup> *Id.* at 30.

<sup>6</sup> *Id.* at 44–45.

<sup>7</sup> *Id.* at 68–69.

<sup>8</sup> See *infra* text accompanying notes 18–23.

<sup>9</sup> See *infra* text accompanying notes 54–79.

consider the most penetrating critique of that thesis—and, therefore, Oman's argument—namely Edmund Burke's critique from tradition, and explain why it seems to me correct. We should be careful attributing too much to markets' capacity to promote liberal pluralism.<sup>10</sup> Indeed, in my opinion, current events at home and abroad demonstrate the limits of the *doux commerce* thesis, and do so rather decisively.<sup>11</sup>

### I. *THE DIGNITY OF COMMERCE*

*The Dignity of Commerce* is an ambitious book. Oman covers most major topics in contemporary contracts scholarship, including efficiency and distributive fairness;<sup>12</sup> adhesion contracts and unconscionability;<sup>13</sup> contract remedies;<sup>14</sup> contracts against public policy;<sup>15</sup> and, of course, consideration.<sup>16</sup> At heart, though, the book attempts to answer the fundamental question of contract law, the one that precedes all the others: why should the law enforce contracts in the first place?<sup>17</sup> Why, with respect to some promises—for the law could not enforce all promises; that would be unworkable—should courts require the promisor either to perform or pay damages? What makes the enforcement of contracts legitimate and not the arbitrary exercise of state power over one citizen at the insistence of another?

Oman maintains that the law should enforce contracts because contracts undergird commerce—and commerce promotes good politics.<sup>18</sup> More specifically, commerce promotes the liberal virtues of tolerance and cooperation necessary for pluralist politics.<sup>19</sup> Oman's argument is thus a moral one.<sup>20</sup> Contracts are morally good because they facilitate markets, and markets are morally good because they promote values essential for liberalism and

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<sup>10</sup> See *infra* text accompanying notes 105–14.

<sup>11</sup> See *infra* text accompanying notes 167–92.

<sup>12</sup> See generally OMAN, *supra* note 1, at 67–85.

<sup>13</sup> See generally *id.* at 133–59.

<sup>14</sup> See generally *id.* at 112–32.

<sup>15</sup> See generally *id.* at 160–81.

<sup>16</sup> See generally *id.* at 89–111.

<sup>17</sup> See *id.* at 16.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.* at 19, 43–49.

<sup>20</sup> *Id.* at 15 (“Markets are good because as a social practice they produce certain outcomes that we should regard as morally desirable.”).

pluralism.<sup>21</sup> (That liberalism and pluralism are themselves morally good is taken as a given). Of course, classical liberalism and pluralism are related.<sup>22</sup> In fact, they mutually reinforce one another: classical liberalism promotes pluralism, and pluralism, in turn, promotes classical liberalism.<sup>23</sup> But Oman tends to analyze the two concepts separately.

Start with classical liberalism. Markets, he maintains, “generate a set of moral habits—virtues—that support a liberal political order.”<sup>24</sup> Markets encourage us to see things from other people’s points of view.<sup>25</sup> You cannot sell customers something if you do not understand what they want or need (or think they want or need).<sup>26</sup> This ability to consider alternative perspectives and offer persuasive appeals for our own position is essential to the reasoned deliberation liberalism requires.<sup>27</sup> Markets also “weaken loyalty to tribe and family,” thus promoting our “ability to relate to strangers according to impersonal criteria,” another quality essential for classical liberalism.<sup>28</sup> And, finally, markets promote equality rather than inherited status, a goal of liberalism from the start.<sup>29</sup>

Relatedly, markets allow us to adapt to the pluralism that pervades modern life—the unavoidable, continuing contact with people who have competing, often opposing, lifestyles and commitments.<sup>30</sup> Markets, Oman argues, “provid[e] a mechanism by which those with sharply differing religious, moral, and political beliefs can peacefully

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<sup>21</sup> *Id.* at 15–16.

<sup>22</sup> *See generally id.* at 40 (discussing how well-functioning markets support liberalism which, in turn, provides a framework for pluralism).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 19.

<sup>25</sup> *Id.* at 44.

<sup>26</sup> Oman has made this argument more recently elsewhere as well. *See* Nathan B. Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. 693, 710–11 (2017) [hereinafter Oman, *Doux Commerce*].

<sup>27</sup> OMAN, *supra* note 1, at 46 (“It is only by acquiring the ability to see the world through the eyes of another that effective political cooperation is possible. This is precisely the skill demanded of a successful trader.”).

<sup>28</sup> *Id.* at 43.

<sup>29</sup> *Id.* at 43–44 (“[M]arkets break down aristocratic habits, encouraging people to relate peaceably as equals.”). On liberalism’s goals with respect to equality and inherited status, *see* PATRICK J. DENEEN, *CONSERVING AMERICA?: ESSAYS ON PRESENT DISCONTENTS* 160 (2017).

<sup>30</sup> *See* OMAN, *supra* note 1, at 40 (discussing “the pervasive pluralism of contemporary society”); *id.* at 51 (noting that “moral pluralism” is “[o]ne of the hallmarks of modern society”).

cooperate.”<sup>31</sup> Markets promote trust between strangers, including strangers from rival and hostile communities.<sup>32</sup> Repeated exchanges in the marketplace, over time, can reassure us that others also value fidelity and fair dealing, whatever their racial, religious, or sexual identities.<sup>33</sup> The market thus trains people to put deep, intractable differences aside—to look the other way—in the interests of closing the deal.<sup>34</sup> In the long run, looking the other way allows people to build relationships of trust they otherwise would not have had.<sup>35</sup> Even if such relationships do not form, learning to look the other way allows us all to avoid conflicts and get on with our lives with a minimum of disturbance.<sup>36</sup>

Finally, Oman maintains, markets are morally good because they produce wealth.<sup>37</sup> “[M]oney answereth all things,” the Bible says.<sup>38</sup> Money certainly helps alleviate many social problems, including, as Oman powerfully argues, deficiencies in public health.<sup>39</sup> “Wealth ... tends to improve conditions for marginalized members of society,” like women, whose “access to formal legal rights closely correlates with a society’s wealth.”<sup>40</sup> In global terms, commerce has contributed greatly to the growth in countries’ Gross Domestic Product (GDP) since World War II.<sup>41</sup> The effects of international trade in promoting wealth, and thus social welfare, are especially pronounced in the parts of the developing world that have opened themselves up to global markets.<sup>42</sup>

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<sup>31</sup> *Id.* at 19. See also Nathan Oman, *Indiana and Doux Commerce*, LAW & RELIG. F. (April 3, 2015), <https://lawandreligionforum.org/2015/04/03/Indiana-and-doux-commerce/> [<https://perma.cc/5LLT-6ZB7>].

<sup>32</sup> OMAN, *supra* note 1, at 30. See also *id.* at 173 (“[T]he interaction with [a restaurant waiter] may be morally valuable, bringing me into positive and productive contact with a stranger outside of my ordinary tribal circle.”).

<sup>33</sup> *Id.* at 58.

<sup>34</sup> See *id.* at 56 (noting that markets encourage participants “to put aside political, moral, or religious concerns when engaged in market transactions”). See also *id.* at 58.

<sup>35</sup> *Id.* at 58.

<sup>36</sup> *Id.* at 56.

<sup>37</sup> See generally *id.* at 58–66.

<sup>38</sup> *Ecclesiastes* 10:19 (King James).

<sup>39</sup> OMAN, *supra* note 1, at 64.

<sup>40</sup> *Id.*

<sup>41</sup> See John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521–22 (2000).

<sup>42</sup> *Id.*

In these moral benefits of markets, Oman finds answers for many enduring puzzles in contract law. For example, in the great consideration debate—that attractive nuisance for contracts scholars—Oman’s appreciation for markets causes him to favor the bargain requirement.<sup>43</sup> If the point of contract law is to facilitate market transactions, and, indirectly, good politics, then bargain should naturally mark out the domain of enforceable promises.<sup>44</sup> In fact, he maintains, market promises should be enforceable even in the absence of a classical *quid pro quo*.<sup>45</sup> And the moral benefits of markets lead him to be somewhat skeptical of attempts to regulate transactions through doctrines like unconscionability and voidness for public policy.<sup>46</sup> It is far better, he says, for the state to regulate social ills like inequality directly, than to forbid entire categories of commercial transactions.<sup>47</sup>

Oman recognizes that not all markets have good moral consequences.<sup>48</sup> “Pernicious” markets, he writes, do not deserve legal protection.<sup>49</sup> The Atlantic slave trade was a market, but it was a moral horror.<sup>50</sup> Likewise, the state may need to intervene where a market systematically excludes whole classes of people, as in the Jim Crow South.<sup>51</sup> And Oman recognizes that the market may colonize non-commercial areas of life where it does not belong—such as marriage and family—ruining many human relationships by reducing them to arm’s length bargains.<sup>52</sup> The law should take care to avoid this danger, Oman says, and resist attempts to apply the market metaphor indiscriminately to all human interactions.<sup>53</sup>

## II. THE *DOUX COMMERCE* THESIS

As Oman acknowledges, his argument for the beneficial political effect of markets goes back a long way in Western political

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<sup>43</sup> See OMAN, *supra* note 1, at 90.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 161.

<sup>47</sup> See *id.* at 180–81.

<sup>48</sup> *Id.* at 160.

<sup>49</sup> *Id.* at 160, 167.

<sup>50</sup> *Id.* at 163, 168.

<sup>51</sup> See *id.* at 25. See also Oman, *Doux Commerce*, *supra* note 26, at 716–17.

<sup>52</sup> See OMAN, *supra* note 1, at 173–75.

<sup>53</sup> *Id.* at 173–74.



thought, to the *doux commerce* thesis of the Enlightenment.<sup>54</sup> The thesis is most closely associated with French *philosophes* like Montesquieu and Voltaire, but Scottish Enlightenment figures like Smith and Hume also endorsed it.<sup>55</sup> The thesis—the phrase usually translates into English as “gentle” commerce, though “gentle” does not fully capture the meaning—holds that commerce tends to civilize people; to make us more reasonable and prudent; less given to political and, especially, religious enthusiasm; more reliable, honest, thrifty, and industrious.<sup>56</sup>

Nowadays, we think of market benefits mostly in terms of the wealth creation that comes through the division of labor and comparative advantage.<sup>57</sup> But the *doux commerce* theorists focused on the market’s political benefits—principally three, all interrelated.<sup>58</sup> First, commerce facilitates stable government by promoting the virtues that make it possible. Although it rewards risk-taking, Montesquieu wrote, commerce also depends on constancy and thrift.<sup>59</sup> The merchant must be diligent, foresighted, and careful to avoid needless expense; he must be orderly and reliable. As an example, Montesquieu offered the port city of Marseille, whose barren territory precluded other pursuits and “made its citizens decide on economic commerce” as a way of life.<sup>60</sup> Their vocation required the Marseillais to be “hardworking in order to replace

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<sup>54</sup> See *id.* at 43. The *doux commerce* thesis has sparked a voluminous literature through the centuries, both pro and con. For good introductions to the thesis, and the classical critiques of it, see ALBERT O. HIRSCHMAN, RIVAL VIEWS OF MARKET SOCIETIES AND OTHER RECENT ESSAYS 105–41 (1986) [hereinafter HIRSCHMAN, RIVAL VIEWS]. See also ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS 59–63, 70–81, 100–13 (1977) [hereinafter HIRSCHMAN, PASSIONS].

<sup>55</sup> See, e.g., HIRSCHMAN, PASSIONS, *supra* note 54, at 60, 70–81 (discussing Montesquieu); *id.* at 100–13 (discussing Smith); HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 109 (discussing Hume); Oman, *Doux Commerce*, *supra* note 26, at 713 (discussing Voltaire).

<sup>56</sup> See, e.g., HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 43 (discussing meaning of “*doux commerce*”); HIRSCHMAN, PASSIONS, *supra* note 54, at 59 (noting the difficulty of translation).

<sup>57</sup> See, e.g., McGinnis & Movsesian, *supra* note 41, at 521 (describing theory of comparative advantage).

<sup>58</sup> See HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 41–43 (explaining that *doux commerce* theorists perceived political benefits of commerce).

<sup>59</sup> MONTESQUIEU, THE SPIRIT OF THE LAWS 340–41 (Anne M. Cohler et al. trans. & eds., 1989) [hereinafter THE SPIRIT OF THE LAWS].

<sup>60</sup> *Id.* at 341.

that which nature refused them,” and “frugal,” too, “in order to live always by a commerce that they would the more surely preserve the less it was advantageous to them.”<sup>61</sup>

To the Enlightenment mind, commerce’s capacity to promote stability made it far superior to other pursuits, especially the quest for glory and domination—associated most strongly with the aristocracy—which inevitably led to political violence and ruin.<sup>62</sup> Christianity had shown itself unequal to the task of curbing the lust for glory, Enlightenment thinkers believed, but the market would succeed.<sup>63</sup> In economist Albert Hirschman’s words, “the steady, if self-centered pull of commercial interests would serve more efficiently as a brake on passionate behavior than the traditional appeals to reason, duty, morals, and religion.”<sup>64</sup> Commerce, Adam Smith maintained, would train people in habits of prudence, “the most useful” of all the virtues.<sup>65</sup> Although not “a hero,” the prudent man was “dependable and decent[;]” importantly, he minded his own business.<sup>66</sup> This image of the merchant as a peaceable and reliable, if somewhat distant, neighbor is consistent with Samuel Johnson’s famous observation that “[t]here are few ways in which a man can be more innocently employed than in getting money.”<sup>67</sup>

Second, commerce promoted the tolerant attitudes that made liberalism and pluralism possible, most especially, the willingness to ignore religious differences and cooperate peaceably as citizens.<sup>68</sup> After decades of religious wars in Europe, Enlightenment thinkers were eager to divorce religion from civil life (in this, they have been perhaps too successful, but that is a subject for another essay), and they perceived that the market, which distributed rewards and punishments irrespective of belief, could provide a mechanism for doing so. The most famous example of this kind of thinking appears

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<sup>61</sup> *Id.*

<sup>62</sup> HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 40.

<sup>63</sup> *See id.* at 38.

<sup>64</sup> *Id.* at 40.

<sup>65</sup> DENNIS RASMUSSEN, THE PROBLEMS AND PROMISE OF COMMERCIAL SOCIETY: ADAM SMITH’S RESPONSE TO ROUSSEAU 119 (2008) (quoting Adam Smith, THE THEORY OF MORAL SENTIMENTS (1790)) (“prudence [is] ‘of all the virtues that which is most useful to the individual’”).

<sup>66</sup> *Id.* at 120.

<sup>67</sup> JAMES BOSWELL, THE LIFE OF SAMUEL JOHNSON 242 (1791) (Bergen Evans ed. 1952).

<sup>68</sup> Paul Horwitz, *The Hobby Lobby Moment*, 128 HARV. L. REV. 154, 177 (2014).

in Voltaire's observations on the Royal Exchange of London, from his *Philosophical Letters* (1733):

Take a view of the Royal Exchange in London, a place more venerable than many courts of justice, where the representatives of all nations meet for the benefit of mankind. There the Jew, the Mahometan, and the Christian transact business together, as though they were all of the same religion, and give the name of Infidels to none but bankrupts; there the Presbyterian confides in the Anabaptist, and the Churchman depends upon the Quaker's word. At the breaking up of this pacific and free assembly, some withdraw to the synagogue, and others to take a glass. This man goes and is baptized in a great tub, in the name of the Father, Son, and Holy Ghost; that man has his son's foreskin cut off, and causes a set of Hebrew words—to the meaning of which he himself is an utter stranger—to be mumbled over the infant; others retire to their churches, and there wait the inspiration of heaven with their hats on; and all are satisfied.<sup>69</sup>

The market would train people to think of religious commitments as incidental concerns that one could not allow to impede cooperation on other, more important and productive activities.<sup>70</sup> This education in benign indifference would be very useful for liberal politics as well.

Finally, commerce trained people in the habits of reciprocity and fairness, if for no other reason than to maintain a reputation for these things, which has definite cash value.<sup>71</sup> A merchant must make himself known to others as cooperative and reliable, as someone who gives as well as receives value. To be perceived as an opportunist who takes unfair advantage of his customers, or who renders little in return for trade, is poisonous to long term commercial success. Eighteenth-century writer Samuel Ricard described it:

Sensing the necessity to be wise and honest in order to succeed, [the merchant] flees vice, or at least his demeanor exhibits decency

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<sup>69</sup> VOLTAIRE, THE WORKS OF VOLTAIRE, VOL. XIX (Philosophical Letters) (1733), <http://oll.libertyfund.org/titles/voltaire-the-works-of-voltaire-vol-xix-philosophical-letters> [<http://perma.cc/MX69-BHPE>].

<sup>70</sup> See RASMUSSEN, *supra* note 65, at 17 ("Following Locke, [the *philosophes*] argued that what is needed is less a citizenry that practices the ancient or Christian virtues than industrious individuals who help increase their society's standard of living ....").

<sup>71</sup> See, e.g., *id.* at 121–22 (discussing Smith's understanding of the importance of reputation in a commercial society).

and seriousness so as not to arouse any adverse judgment on the part of present and future acquaintances; he would not dare make a spectacle of himself for fear of damaging his credit standing ....<sup>72</sup>

Centuries later, the German sociologist Georg Simmel would suggest that commerce could even promote a kind of social empathy, since it encouraged businessmen to identify with their customers in order to sell them things.<sup>73</sup> The key point is that commerce encourages people to be other-regarding in a way that abstract religious and moral commitments cannot and, thus, promotes the social harmony necessary for stable politics.<sup>74</sup>

According to the *doux commerce* thesis, the benefits of commerce were not limited to domestic politics. Internationally, too, commerce was thought to promote harmony by creating networks based in nations' reciprocity and mutual interest.<sup>75</sup> "The natural effect of commerce is to lead to peace," Montesquieu wrote.<sup>76</sup> "Two nations that trade with each other become reciprocally dependent; if one has an interest in buying, the other has an interest in selling, and all unions are founded on mutual needs."<sup>77</sup> In fact, the more self-confident versions of the *doux commerce* thesis predicted a peaceful global civilization grounded in trade. Commerce "is a pacific system, operating to cordialize mankind, by rendering nations, as well as individuals, useful to each other," Thomas Paine declared in *The Rights of Man* (1792).<sup>78</sup> "If commerce were permitted to act to the universal extent it is capable, it would extirpate the system of war .... The invention of commerce ... is the greatest approach towards universal civilization, that has yet been made by any means not immediately flowing from moral principles."<sup>79</sup>

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<sup>72</sup> HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 108.

<sup>73</sup> See GEORG SIMMEL, CONFLICT AND THE WEB OF GROUP AFFILIATIONS 61–62 (*Conflict*, Kurt Wolff trans. 1955). See also HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 121 (discussing Simmel).

<sup>74</sup> For more on how commerce promotes "other-regardingness," see OMAN, *supra* note 1, at 44–46.

<sup>75</sup> SPIRIT OF THE LAWS, *supra* note 59, at 338.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> THOMAS PAINE, RIGHTS OF MAN, COMMON SENSE, AND OTHER POLITICAL WRITINGS 265 (Mark Philp ed. 1995).

<sup>79</sup> *Id.* at 266.

The *doux commerce* thesis drew criticism at the time, and has done so ever since, both from the Left and the Right.<sup>80</sup> Even its originators perceived weaknesses in the thesis. Montesquieu conceded that commerce could corrupt good morals as well as promote them—he cited Plato as authority for this, which shows how far back debates about the social effects of commerce go—and lead to what we would today call “commodification,” the tendency to reduce all human interactions and relationships to cash value.<sup>81</sup> “We see that in countries where one is affected only by the spirit of commerce”—he offered Holland as an example—“there is traffic in all human activities and all moral virtues; the smallest things, those required by humanity, are done or given for money.”<sup>82</sup> The human impulse to generosity atrophies in commercial societies, he warned, as everything becomes a matter of exchange.<sup>83</sup> By contrast, “hospitality, so rare among commercial countries, is notable among bandit peoples.”<sup>84</sup>

Smith, too, recognized the moral dangers that lurk in commercial societies.<sup>85</sup> In such societies, he believed, people constantly devote themselves to “the pursuit of wealth” and, consequently, “have little time to undertake any activities that require great courage or spirit.”<sup>86</sup> They increasingly lose interest in civic affairs and the capacity to defend themselves and their homes from foreign violence; generally, they become bad citizens.<sup>87</sup> Commerce leads to inequality and promotes wasteful ostentation and useless luxury—a later critic would call it “conspicuous consumption”—that in turn promotes envy and social discord.<sup>88</sup> Most of all, commercial society encourages an insatiable acquisitiveness that ultimately contributes to people’s unhappiness, as they accumulate more and

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<sup>80</sup> HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 110, 112.

<sup>81</sup> “Commerce corrupts pure mores, and this was the subject of Plato’s complaints ....” SPIRIT OF THE LAWS, *supra* note 59, at 338. On “commodification,” see OMAN, *supra* note 1, at 170.

<sup>82</sup> SPIRIT OF THE LAWS, *supra* note 59, at 338–39.

<sup>83</sup> *See id.*

<sup>84</sup> *Id.* at 339.

<sup>85</sup> *See* RASMUSSEN, *supra* note 65, at 75.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *See id.* at 72, 82. On conspicuous consumption, see THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 49 (1899) (Martha Banta ed. 2007).

more material goods in a futile effort to be contented—or, at least, better off than others.<sup>89</sup> Notwithstanding these criticisms, Smith endorsed the *doux commerce* thesis, because he believed that commercial societies, for all their faults, represented a great improvement over the possible alternatives.<sup>90</sup> But it is striking to see how much Smith shared with the great eighteenth-century critic of the commercial society, Rousseau.<sup>91</sup>

Smith could have found an illustration to justify his concerns about commercial society close to home. Eighteenth-century London—that city whose Royal Exchange so impressed Voltaire with its peaceable religious tolerance<sup>92</sup>—itself offered an example of how commerce could degrade social values, at least according to Samuel Johnson.<sup>93</sup> In the Gordon Riots of 1780, Protestant mobs enraged by the grant of civil rights to Catholics terrorized the city for five days, burning Catholic churches and schools and the houses of prominent Catholics until the army put them down, at the personal order of the King, with considerable loss of life.<sup>94</sup> Hundreds of people were killed.<sup>95</sup> The citizens of London famously did nothing to stop the rioters, a failure Johnson attributed to the malevolent effects of commerce.<sup>96</sup> Where Voltaire had seen commerce as a civilizing force, allowing different religious communities to live side by side and engage in mutually beneficial projects,<sup>97</sup> Johnson drew a different conclusion. Commerce, he believed, had made Londoners self-absorbed and indifferent to the common good.<sup>98</sup> The rioters could easily have been put down if only other citizens had

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<sup>89</sup> See RASMUSSEN, *supra* note 65, at 82–88. Two centuries later, describing the subsequent history of the market society in the West, sociologist Daniel Bell put it this way: “In Aristotle’s terms, *wants* replaced *needs*—and wants, by their nature, are unlimited and insatiable.” DANIEL BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 224 (1976).

<sup>90</sup> RASMUSSEN, *supra* note 65, at 12–13, 159.

<sup>91</sup> See *id.* at 51.

<sup>92</sup> See *supra* text accompanying note 69.

<sup>93</sup> NICHOLAS HUDSON, *A POLITICAL BIOGRAPHY OF SAMUEL JOHNSON* 181, 192 (2013).

<sup>94</sup> ROBERT TOOMBS, *THE ENGLISH AND THEIR HISTORY* 359–60 (2015).

<sup>95</sup> PETER ACKROYD, *LONDON: THE BIOGRAPHY* 486 (2000).

<sup>96</sup> HUDSON, *supra* note 93, at 181, 192.

<sup>97</sup> See *supra* text accompanying note 69.

<sup>98</sup> HUDSON, *supra* note 93, at 181, 192.



stood up to them. But no one did. “Such,” he famously observed, “is the cowardice of a commercial place.”<sup>99</sup>

### III. THE BURKEAN CRITIQUE

The arguments for and against the political benefits of markets have been recapitulated many times down the centuries.<sup>100</sup> It does not make sense to catalogue all the arguments here; the debate, it seems to me, has been fought to a draw. Each side can adduce evidence to support its position. *Doux commerce* enthusiasts can point to the success of trade in pulling countries out of poverty and in bringing together previously warring nations in new political unions, like the European Union.<sup>101</sup> Skeptics can point to the many societies throughout history that have followed the path from industriousness and thrift through wealth to decadence, including the one with which Oman begins and ends *The Dignity of Commerce: Renaissance Venice*.<sup>102</sup> The high level of trade between states has not prevented violent conflicts between them and, as for the European Union, it is impossible to ignore the crisis it faces today, notwithstanding the high volume of trade in goods and services among the members states.<sup>103</sup> I will return to the example of the European Union in a moment.

We will not resolve the debate here. Perhaps, as Albert Hirschman once suggested, the *doux commerce* thesis is right and wrong at the same time: the market both promotes *and* corrupts good morals.<sup>104</sup> I would like to spend some time, though, on what I think is the most powerful critique of the *doux commerce* thesis, a critique we do not often hear nowadays. It is a conservative critique, most closely associated with Edmund Burke, that Old Whig who has

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<sup>99</sup> ACKROYD, *supra* note 95, at 485 (internal quotations removed).

<sup>100</sup> For a good summary of the arguments through history, see HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 117–35.

<sup>101</sup> See McGinnis & Movsesian, *supra* note 41, at 521–22 (noting the importance of trade to nations’ development).

<sup>102</sup> OMAN, *supra* note 1, at 1–8, 183–84. For an accessible recent history of Venice, see generally THOMAS F. MADDEN, VENICE: A NEW HISTORY (2012). For more on Venice, see *infra* text accompanying notes 122–43.

<sup>103</sup> See Mark L. Movsesian, *The Persistent Nation State and the Foreign Sovereign Immunities Act*, 18 CARDOZO L. REV. 1083, 1092 (1996) (noting that financial interdependence among nations did not prevent the outbreak of the First World War).

<sup>104</sup> See HIRSCHMAN, RIVAL VIEWS, *supra* note 54, at 139.

come to stand for conservatism in the English-speaking world.<sup>105</sup> Burke's critique should make us skeptical about commerce's capacity to promote pluralism and liberalism where those values do not already exist.

Burke favored free markets, religious toleration, and political pluralism.<sup>106</sup> But he did not see any of those things as inevitable, and he did not think free markets alone could produce the other two. For Burke, the *doux commerce* thesis had cause and effect backwards.<sup>107</sup> The market does not create virtues and habits of mind; rather, it depends on pre-existing virtues and habits of mind, like law-abidingness, probity, toleration, and trust, all of which people bring to it from other sources—from the wider culture, and, especially, from religion.<sup>108</sup> Without those pre-existing virtues and habits, the free market would collapse.

The most famous example of Burke's thinking in this regard comes from his *Reflections on the French Revolution*, which he wrote in 1790.<sup>109</sup> In *Reflections*, Burke offered an extended critique of the French Revolution and the ideas that motivated it, including the rationalism of the *philosophes*.<sup>110</sup> One mistake the *philosophes* made,

<sup>105</sup> See JESSE NORMAN, EDMUND BURKE: THE FIRST CONSERVATIVE 146 (2013) (Burke was “a New Whig in chronology, but an Old Whig in spirit”); *id.* at 286 (noting that Burke offers a critique of markets “not from the left of the political spectrum, but from the right”). For a classic introduction to Burke and his politics, see generally RUSSELL KIRK, THE CONSERVATIVE MIND: FROM BURKE TO ELIOT (7th rev. ed. 1985). For a more recent treatment, see generally YUVAL LEVIN, THE GREAT DEBATE: EDMUND BURKE, THOMAS PAINE, AND THE BIRTH OF RIGHT AND LEFT (2014).

<sup>106</sup> See NORMAN, *supra* note 105, at 91 (Burke's views on religious toleration); *id.* at 118 (Burke's admiration of India's “religious and cultural pluralism”); *id.* at 283 (Burke's support of free markets).

<sup>107</sup> See J.G.A. Pocock, *The Political Economy of Burke's Analysis of the French Revolution*, 25 HIST. J. 331, 337, 347 (1982).

<sup>108</sup> See NORMAN, *supra* note 105, at 208–09 (explaining that, for Burke, successful commerce depended on social “manners,” which, in turn, depend in large part on religion); *id.* at 283 (explaining that Burke “was an early supporter of free markets, but only within a strong context of personal probity, law, market norms and trust”). See also Pocock, *supra* note 107, at 347 (discussing Burke's views on manners and markets).

<sup>109</sup> See generally EDMUND BURKE, *Reflections on the Revolution in France* (1790), in REFLECTIONS ON THE REVOLUTION IN FRANCE AND OTHER WRITINGS 425 (Jessie Norman Ed., 2015) [hereinafter REFLECTIONS]. For an introduction to the *Reflections*, see LEVIN, *supra* note 105, at 28–31.

<sup>110</sup> KIRK, *supra* note 105, at 26.



according to Burke, was to trust in abstract ideas, rather than history and custom, as a basis for organizing and sustaining society.<sup>111</sup> This mistake extended to economics, which the *philosophes* believed an independent science that could operate, of itself, to create good morals.<sup>112</sup> But this was deeply wrong. The market, Burke argued, depended on “ancient manners,” which, in turn, depended on religious and social traditions.<sup>113</sup> The famous passage from *Reflections* that expresses Burke’s understanding is worth quoting at length:

We are but too apt to consider things in the state in which we find them, without sufficiently adverting to the causes by which they have been produced, and possibly may be upheld. Nothing is more certain, than that our manners, our civilization, and all the good things which are connected with manners and with civilization have, in this European world of ours, depended for ages upon two principles; and were indeed the result of both combined; I mean the spirit of a gentleman, and the spirit of religion .... Even commerce, and trade, and manufacture, the gods of our economical politicians, are themselves perhaps but creatures; are themselves but effects, which, as first causes, we choose to worship .... Where trade and manufactures are wanting to a people, and the spirit of nobility and religion remains, sentiment supplies, and not always ill supplies, their place; but if commerce and the arts should be lost in an experiment to try how well a state may stand without these old fundamental principles, what sort of a thing must be a nation of gross, stupid, ferocious, and, at the same time, poor and sordid, barbarians, destitute of religion, honour, or manly pride, possessing nothing at present, and hoping for nothing hereafter?<sup>114</sup>

Most conservatives today are likely to be put off by Burke’s praise of aristocracy—the eighteenth-century revolutions have succeeded well in that regard—but his basic point remains accessible. The tolerant, pluralist marketplace of the *doux commerce* thesis

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<sup>111</sup> NORMAN, *supra* note 105, at 194; *cf.* KIRK, *supra* note 105, at 9 (discussing this aspect of conservative thought).

<sup>112</sup> KIRK, *supra* note 105, at 65 (“Burke knew that economics and politics are not independent sciences: they are no more than manifestations of a general order, and that order is moral.”). *See also* Pocock, *supra* note 107, at 347 (“Burke proposed to reverse the Scottish thesis that commerce had been the motor force behind the growth of manners ....”).

<sup>113</sup> REFLECTIONS, *supra* note 109, at 493. *See also* NORMAN, *supra* note 105, at 209 (“Commerce and business have promoted the growth of manners; but ultimately both commerce and politics rely on manners—that is, on the trust engendered by the social order.”).

<sup>114</sup> REFLECTIONS, *supra* note 109, at 493.

is itself a “cultural artefac[t]” that cannot be divorced from the Western traditions that gave rise to it.<sup>115</sup> It is wrong to think that markets inevitably lead to liberalism. It is the liberal tradition that creates the sort of marketplace Enlightenment thinkers praised.

This critique makes a great deal of sense to me. Markets existed before the Enlightenment project began, and will exist after the Enlightenment project runs its course, and not all of them have been or will be characterized by religious indifference and pluralism. When I reread Voltaire’s famous description of the London Exchange, for example, I thought of a different anecdote from the other side of Europe, from many centuries earlier. Like eighteenth-century London, Byzantine Constantinople had a thriving economy, based largely in commerce.<sup>116</sup> In late antiquity and the medieval period, Constantinople was perhaps the most economically dynamic city in the world, with astounding wealth and markets that drew traders from across the Mediterranean.<sup>117</sup>

Yet, Byzantium was hardly a liberal, pluralist society, and it was not religiously indifferent.<sup>118</sup> In fact, judging from contemporary accounts, the residents of Constantinople had a sort of mania for religious disputes.<sup>119</sup> As theologian Timothy (now Metropolitan Kallistos) Ware puts it, “[t]oday, in an untheological age, it is all but impossible to realize how burning an interest was felt in religious

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<sup>115</sup> NORMAN, *supra* note 105, at 286.

<sup>116</sup> See Angeliki E. Laiou, *Byzantium and the West*, in BYZANTIUM: A WORLD CIVILIZATION 61, 72 (Angeliki E. Laiou & Henry Maguire eds. 1992); Elizabeth Williams, *Trade and Commercial Activity in the Byzantine and Early Islamic Middle East*, METROPOLITAN MUSEUM OF ART (May 2012), [http://www.metmuseum.org/toah/hd/coin/hd\\_coin.htm](http://www.metmuseum.org/toah/hd/coin/hd_coin.htm) [<https://perma.cc/J645-8GAF>]. On trade in the Byzantine economy, see generally Angeliki E. Laiou, *The Byzantine Economy in the Mediterranean Trade System; Thirteenth–Fifteenth Centuries*, in GENDER, SOCIETY AND ECONOMIC LIFE IN BYZANTIUM 177–222 (1992).

<sup>117</sup> See Williams, *supra* note 116. See also MADDEN, *supra* note 102, at 60 (noting that twelfth-century Constantinople was “the richest city in the Western world”).

<sup>118</sup> See, e.g., DONALD M. NICOL, CHURCH AND SOCIETY IN THE LAST CENTURIES OF BYZANTIUM 2 (1977) (explaining that in “the Byzantine world, the distinction between things spiritual and things temporal was often blurred and seldom defined”); MARK WHITTOW, THE MAKING OF BYZANTIUM, 600–1025, at 126 (1996) (explaining that most Byzantine subjects “saw themselves less as ‘Romans’ than as ‘orthodox Christians’”).

<sup>119</sup> On the pervasive importance of theological debate in Byzantine society, see NICOL, *supra* note 118, at 6–7.

questions by every part of society, by laity as well as clergy, by the poor and uneducated as well as the Court and the scholars.”<sup>120</sup> Here, for example, is a famous letter by Gregory of Nyssa, one of the fourth century Cappadocian Fathers, describing how difficult it was to engage in the simplest, quotidian transactions without having to debate theology:

The whole city is full of it, the squares, the market places, the cross-roads, the alleyways; old-clothes men, money changers, food sellers: they are all busy arguing. If you ask someone to give you change, he philosophizes about the Begotten and the Unbegotten; if you inquire about the price of a loaf, you are told by way of reply that the Father is greater and the Son inferior; if you ask ‘Is my bath ready?’ the attendant answers that the Son was made out of nothing.<sup>121</sup>

The traders of Byzantium did not, it seems, check their religion at the door.

Or consider the example with which Oman begins and ends his book, Renaissance Venice, the Venice of Shakespeare’s play.<sup>122</sup> At the time—and since—Venice offered the prototype of the commercial republic, a city where people from different, and mutually antagonistic, religions made fortunes trading peacefully with one another, regardless of confessional loyalty.<sup>123</sup> Venice was a tolerant, bourgeois place, indifferent to most things besides trade and profit.<sup>124</sup> The city’s great wealth and culture depended on its willingness to host different communities, and enforce contracts among them, without worrying about what Rawls would later call “comprehensive doctrines.”<sup>125</sup> What an inspiration for liberalism and the *doux commerce* thesis!

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<sup>120</sup> TIMOTHY WARE, *THE ORTHODOX CHURCH* 35 (new ed. 1997).

<sup>121</sup> *Id.*

<sup>122</sup> OMAN, *supra* note 1, at 1–8, 183–84.

<sup>123</sup> For an evocative description of commerce during Venice’s heyday, see PETER ACKROYD, *VENICE: PURE CITY* 101–19 (2009) [hereinafter ACKROYD, *VENICE*]. For a description of the many religious and ethnic communities that resided in the city, see *id.* at 42–45.

<sup>124</sup> See *id.* at 101.

<sup>125</sup> See OMAN, *supra* note 1, at 4–5. On Rawls and “comprehensive doctrines,” see Leif Wenar, *John Rawls*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed. Spring 2017), <https://plato.stanford.edu/archives/spr2017/entries/rawls/> [http://perma.cc/X3JP-GA55].

Yet, this is only part of the story. Venice was also an intensely traditional, hierarchical place.<sup>126</sup> The city balanced devotion to the fluid world of commerce with an equal devotion to the static world of custom.<sup>127</sup> As Peter Ackroyd explains in his marvelous book, *Venice: Pure City*, Venice was “the most conservative of societies.”<sup>128</sup> In law and government, ancient usage had preeminent authority, more than positive legislation.<sup>129</sup> Social interactions followed patterns that did not change for centuries.<sup>130</sup> Convention dictated what clothes different classes could wear.<sup>131</sup> Patricians wore stiff black gowns, which highlighted gravity and authority, not flexibility and cosmopolitanism.<sup>132</sup> In architecture, generation after generation followed old models. When buildings collapsed, Venetians would reconstruct them exactly as they had been, often using the same materials.<sup>133</sup> *Dov’era, com’era*.

And Venice was exceptionally religious. The city’s enthusiastic participation in the Crusades is well known, and was a matter of great pride for Venetians.<sup>134</sup> Crusading was always partly a search for loot, of course, but for Venetians it was more than that. Venetians were genuinely devout, perhaps excessively so.<sup>135</sup> Hundreds of churches shared a very small space in the city; religious processions were numerous and frequent.<sup>136</sup> Reports of miracles were common; only Rome had more.<sup>137</sup> Venetians were not saints. They never lost sight of the main chance. But Christianity was central

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<sup>126</sup> This and the next paragraph are drawn from an earlier essay. Mark Movsesian, *The Merchants of Venice: Markets and Tradition in the Serene Republic*, FIRST THINGS (April 27, 2015), <https://www.firstthings.com/blogs/firstthoughts/2015/04/the-merchants-of-venice> [<https://perma.cc/4GGZ-P3KC>].

<sup>127</sup> ACKROYD, VENICE, *supra* note 123, at 93.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* (noting that “[c]ustom was ... considered to transcend positive or systematic law”).

<sup>130</sup> *See id.*

<sup>131</sup> *See id.* at 126–27.

<sup>132</sup> *Id.* at 126.

<sup>133</sup> *Id.* at 93. A very good example is the bell tower of St. Mark’s. After it collapsed in July 1902, Venetians rebuilt it, on the same spot, exactly as it had been. MADDEN, *supra* note 102, at 398–99.

<sup>134</sup> MADDEN, *supra* note 102, at 115.

<sup>135</sup> ACKROYD, VENICE, *supra* note 123, at 300 (noting that the Venetian people were “excessively devout”).

<sup>136</sup> *Id.* at 301.

<sup>137</sup> *Id.* at 291.

to their identity.<sup>138</sup> Ackroyd sums it up best: “Machiavelli wrote that ‘we Italians are corrupt and irreligious beyond all others.’ That was not true of the Venetians. They were corrupt and religious.”<sup>139</sup>

If we want to explain what made Venice so wealthy and stable over centuries, then, we must take into account not only its devotion to commerce, but the deeply traditional nature of Venetian society.<sup>140</sup> Commerce alone did not make Venice what it was; it was also the strong bonds of religion and custom that drew Venetians together and allowed them to cooperate efficiently. And commerce did not render Venice, in the end, a model of liberal toleration. The secret police were famous, and informers were everywhere.<sup>141</sup> Venice was a closed society, one which allowed outsiders like Jews to reside in the city in order to enrich it, but which did not treat them as equal members of the community.<sup>142</sup> It was Napoleon’s army, not centuries of *doux commerce*, which finally put an end to the Venetian ghetto.<sup>143</sup>

In this regard, I take a rather different message from Shakespeare’s play than Oman does. For Oman, *The Merchant of Venice* is important for what it says about the market’s role in promoting “the wealth and the liberal character of the city.”<sup>144</sup> The play’s central dilemma, he says, is that Venice *must* enforce the contract for a pound of flesh if the city’s prosperity and way of life are to be preserved.<sup>145</sup> If the city fails to honor all contracts, even those that give cruel rewards to foreigners like Shylock at the expense of Venetians like Antonio, its commerce will dry up, “Since that the trade and profit of the city / Consisteth of all nations.”<sup>146</sup> Foreigners will no longer trade in the city. A plot device saves the situation, but the message is clear: liberalism, tolerance, and the

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<sup>138</sup> *See id.* at 289–90.

<sup>139</sup> *Id.* at 290.

<sup>140</sup> *Id.* at 93 (noting the traditionalism of Venetian society).

<sup>141</sup> *Id.* at 89–91.

<sup>142</sup> *See id.* at 49.

<sup>143</sup> *See* David Laskin, *500 Years of Jewish Life in Venice*, N.Y. TIMES (March 9, 2016), <https://www.nytimes.com/2016/03/13/travel/venice-italy-jewish-ghetto.html> [<https://perma.cc/4TNB-F4U4>].

<sup>144</sup> OMAN, *supra* note 1, at 183.

<sup>145</sup> *Id.* at 4–5.

<sup>146</sup> *Id.* at 5 (quoting SHAKESPEARE, *THE MERCHANT OF VENICE* act 3, sc. 3, 30–31).

profit that comes from them depend on the neutral enforcement of all contracts, regardless of the identity of the parties.<sup>147</sup>

I read *The Merchant of Venice* differently. To me, its central message is that commerce cannot, in the end, obscure deep religious difference and promote lasting peace between rival communities. In his great essay on the play, “On Christian and Jew,” Allan Bloom uncovers the play’s essential truth: commerce promotes only a superficial cooperation, a surface tolerance that disappears at moments of crisis<sup>148</sup>:

The law of Venice can force [Shylock and Antonio] to a temporary truce, but in any crucial instance the conflict will re-emerge, and each will try to destroy the spirit of the law; for each has a different way of life which, if it were universalized within the city, would destroy that of the other. They have no common ground.<sup>149</sup>

Only when people agree about what is most important in life can they be said to form a community—and *doux commerce* can hide disagreements for only so long.<sup>150</sup>

But we do need not look to Renaissance Venice, or medieval Byzantium, or eighteenth-century London to perceive the limits of the *doux commerce* thesis and the truth of the Burkean critique. Current events offer good evidence. In the international context, since the fall of the Iron Curtain in 1989, the West has made the expansion of liberal markets a centerpiece of its diplomacy.<sup>151</sup> The so-called “Washington Consensus” promoted “democracy, free markets, and the rule of law”—the fundamentals of neoliberalism—as the keys to global development.<sup>152</sup> It inspired the transformation of the GATT into the WTO and the creation of regional free trade zones like NAFTA.<sup>153</sup> The *doux commerce* thesis also supported

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<sup>147</sup> *Id.*

<sup>148</sup> Allan Bloom, *On Christian and Jew*, in ALLAN BLOOM & HARRY V. JAFFA, *SHAKESPEARE’S POLITICS* 13 (1964).

<sup>149</sup> *Id.* at 17.

<sup>150</sup> *See id.* at 20–21 (“When men do not agree about what is most important, they can hardly be said to constitute a community.”).

<sup>151</sup> *See, e.g.,* Antony Anghie, *The Grotius Lecture: ASIL 2010—International Law in a Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT’L L. REV. 1315, 1344 (2011).

<sup>152</sup> Ozan O. Varol, *Stealth Authoritarianism*, 100 IOWA L. REV. 1673, 1725 (2014).

<sup>153</sup> *See* Robert Howse & Kalypso Nicolaïdis, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large*, 79 LAW & CONTEMP. PROBS. 259, 264–65



the drive for “an ever closer union” in Europe.<sup>154</sup> A single market was supposed to provide the foundation for a common political enterprise that could join together countries as diverse as the UK and Bulgaria and sustain a common currency for economies as different as Greece and Germany.<sup>155</sup> And the *doux commerce* thesis inspired the movement to install liberal markets in places, like Russia, that lacked a liberal tradition.<sup>156</sup> All these endeavors assumed that market liberalism would inevitably have beneficial political consequences—that ethnic and national identities would recede in favor of pluralism, tolerance, and other liberal political values.

Things can change, of course, but at the moment this project does not look like a great success.<sup>157</sup> Liberalism and democracy are not experiencing triumph across the world; in fact, rather the opposite.<sup>158</sup> The movement toward global free trade has stalled.<sup>159</sup> The Doha Round of trade negotiations broke down several years ago over disagreements between developed and developing countries (and also within the developed world) over agriculture subsidies, and shows

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(2016) (discussing WTO); Patricia Fernández-Kelly, *NAFTA and Beyond: Alternative Perspectives in the Study of Global Trade and Development*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 6, 6 (2007) (discussing NAFTA). On the transformation of GATT to the WTO, see Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 EUR. J. INT'L L. 9, 13–24 (2016).

<sup>154</sup> Consolidated Version of The Treaty on European Union art. 1, Oct. 26, 2012, 2012 O.J. (C 326) 13 (“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe ....”)

<sup>155</sup> See *The EU in Brief*, EUROPA (July 20, 2017) [https://europa.eu/european-union/about-eu/eu-in-brief\\_en](https://europa.eu/european-union/about-eu/eu-in-brief_en) [<https://perma.cc/MDY5-368N>]. For the current list of EU Member States, see *EU Member Countries in Brief*, EUROPA (July 20, 2017) [https://europa.eu/european-union/about-eu/countries/member-countries\\_en](https://europa.eu/european-union/about-eu/countries/member-countries_en) [<https://perma.cc/6BNN-JTPY>].

<sup>156</sup> Cf. NORMAN, *supra* note 105, at 238, 285 (discussing Western policy toward Russia in the 1990s).

<sup>157</sup> See Nikil Saval, *Globalisation: the rise and fall of an idea that swept the world*, GUARDIAN (July 14, 2017), <https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world> [<https://perma.cc/699R-L5GW>].

<sup>158</sup> See Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation*, 27 J. DEMOCRACY 5 (2016). See also Mark Movsesian, *The End of the Liberal Tradition?*, FIRST THINGS (Aug. 17, 2016), <https://www.firstthings.com/web-exclusives/2016/08/the-end-of-the-liberal-tradition> [<https://perma.cc/ZAX3-PBF6>].

<sup>159</sup> See, e.g., Timothy Meyer, *Saving the Political Consensus in Favor of Free Trade*, 70 VAND. L. REV. 985, 987–88 (2017).

no sign of revival.<sup>160</sup> As one of his first acts, President Trump withdrew the US from the Trans-Pacific Partnership—Hillary Clinton would likely have done the same—and his supporters' irritation with NAFTA helped elect him last November.<sup>161</sup> Trump tapped into a long-simmering resentment among Americans who perceive free trade, and the free immigration that accompanies it, as a threat to their livelihoods and ways of life.<sup>162</sup>

In Europe, old national divisions have resurfaced; indeed, they never really went away.<sup>163</sup> If anything, national ties seem to have strengthened as the EU has expanded to include countries outside the Western European core, and as people come to realize what the free movement of people actually entails.<sup>164</sup> Following the Brexit referendum in June 2016, the UK triggered the formal exit process in March 2017.<sup>165</sup> Significant anti-EU movements exist in France, Italy, the Netherlands, even Germany—and of course in poorer members like Greece, where 2015's debt crisis threatens to break out again.<sup>166</sup> In Russia, the attempt to create political pluralism through deregulation and the export of liberal markets obviously has failed.<sup>167</sup> As Jesse Norman writes, Russia lacked the liberal traditions that make free markets work—for example, levels of

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<sup>160</sup> Rafael Leal-Arcas, *The European Union and New Leading Powers: Towards Partnership in Strategic Trade Policy Areas*, 32 FORDHAM INT'L L.J. 345, 362 (2009). For more on the collapse of the Doha Round, see generally Stephen Kim Park, *Talking the Talk and Walking the Walk: Reviving Global Trade and Development after Doha*, 53 VA. J. INT'L L. 365, 378–84 (2013).

<sup>161</sup> See Meyer, *supra* note 159, at 988, 998.

<sup>162</sup> On how opposition to free trade helped propel Trump to the White House, see *id.* at 988, 998.

<sup>163</sup> See Christina Pazzanese, *In Europe, nationalism rising*, HARV. GAZETTE (Feb. 27, 2017), <http://news.harvard.edu/gazette/story/2017/02/in-europe-nationalisms-rising/> [<https://perma.cc/7XQV-HCJ8>].

<sup>164</sup> See *id.*; Tony Barber, *A renewed nationalism is stalking Europe*, FIN. TIMES (July 11, 2016), <https://www.ft.com/content/53fc4518-4520-11e6-9b66-0712b3873ae1>.

<sup>165</sup> Anushka Asthana et al., *May triggers article 50 with warning of consequence for UK*, GUARDIAN (Mar. 29, 2017), <https://www.theguardian.com/politics/2017/mar/29/theresa-may-triggers-article-50-with-warning-of-consequences-for-uk> [<https://perma.cc/C8Q2-MYCL>].

<sup>166</sup> See *Guide to nationalist parties challenging Europe*, BBC NEWS (May 23, 2016), <http://www.bbc.com/news/world-europe-36130006> [<https://perma.cc/9ECH-BWHP>].

<sup>167</sup> See NORMAN, *supra* note 105, at 238–39.



social trust that encourage people to deal fairly with strangers.<sup>168</sup> As a result, market liberalization in Russia merely “assisted the loss of public assets to the new oligarchs.”<sup>169</sup>

In Burkean terms, the crisis facing the EU, and the resistance to regional trade agreements like NAFTA, demonstrate that the *doux commerce* theory gets cause and effect backwards. Projects like the EU and even NAFTA require that people trust one another and feel they belong to the same community. But the market cannot create community where it does not already exist, or, to put it in opposite terms, cannot overcome divisions when those divisions are sufficiently deep.<sup>170</sup>

Domestically, too, the *doux commerce* thesis has shown its limitations lately. Everyone knows about the recent clashes between LGBT couples and business owners who decline, from religious conviction, to provide services for same-sex weddings.<sup>171</sup> Neither side is willing to look the other way, as the *doux commerce* thesis suggests they should—neither the LGBT couples, who could easily find other businesses to provide the services, nor the business owners, who could easily make money, and avoid lawsuits, by providing them.<sup>172</sup> The Contraception Mandate offers another illustration.<sup>173</sup> Firms felt strongly enough about the issue that they were unwilling to bracket their deep convictions in order to have smooth commercial dealings—and people on the other side were likewise unwilling to forgo theirs.<sup>174</sup> On questions like these, as Paul Horwitz writes, “the marketplace has become a battleground.”<sup>175</sup>

Or take another example. In New York City, where I live, stores owned by Hasidic Jews got in trouble with the city’s human

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<sup>168</sup> *Id.* at 285.

<sup>169</sup> *Id.*

<sup>170</sup> See Bloom, *supra* note 148, at 17; *id.* at 20–21 (“When men do not agree about what is most important, they can hardly be said to constitute a community.”).

<sup>171</sup> *E.g.*, Craig v. Masterpiece Cakeshop, 370 P.3d 272 (Colo. App. 2015), *cert. granted sub nom.* Masterpiece Cakeshop v. Colorado Civil Rights Com’n, \_\_\_ U.S. \_\_\_ (2017). See also State v. Arlene’s Flowers Inc., 389 P.3d 543 (Wash. 2017); Elane Photography, LLC v. Willcock, 309 P.2d 53 (N.M. 2013), *cert. denied*, 134 S. Ct. 1787 (2014).

<sup>172</sup> For an argument that the *doux commerce* thesis would help participants avoid “intractable dispute[s]” about providing services for same-sex weddings, see Oman, *Doux Commerce*, *supra* note 26, at 696. See also *id.* at 719–32.

<sup>173</sup> Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014).

<sup>174</sup> See Horwitz, *supra* note 68, at 180–84.

<sup>175</sup> *Id.* at 183.

rights commission a few years ago for requiring shoppers to “dress modestly.”<sup>176</sup> “Dress modestly” apparently meant no low necklines on women, and some women complained that the stores were violating their human rights.<sup>177</sup> The city eventually dropped the case, after the stores agreed to post additional signs stating they did “not discriminate on the basis of race, religion or gender,” but the basic point remains.<sup>178</sup> Neither side in the dispute was willing to look the other way—not the storeowners, who stood to lose business, nor the shoppers, who could have exercised old-fashioned market discipline by taking their custom elsewhere. Examples like these show the truth of Bloom’s observation.<sup>179</sup> Where there are deep clashes of values—and, in twenty-first-century America, no clashes are deeper than those involving identity—commerce can do little to overcome them.

Perhaps these controversies are outliers. But more systematic evidence exists of the limits of *doux commerce* in American life. Twenty-first-century America is a market society. As Michael Sandel observes, “[w]e live at a time when almost everything can be bought and sold.”<sup>180</sup> If anywhere, you would expect the *doux commerce* thesis to bear fruit here, in our own commercial republic. Yet, notwithstanding the dominance of the market metaphor in our culture, levels of social trust in America are quite low.<sup>181</sup> For decades, the General Social Survey has asked respondents whether they thought that most people could be trusted.<sup>182</sup> In 1972, almost half of Americans said yes. In the latest survey, in 2016, only about

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<sup>176</sup> Mark Movsesian, *NYC Sues Hasidic Shopkeepers Over Dress Codes*, FIRST THINGS (Feb. 21, 2013), <https://www.firstthings.com/blogs/firstthoughts/2013/02/nyc-sues-hasidic-shopkeepers-over-dress-codes> [https://perma.cc/7UB7-69NF] (internal quotations omitted).

<sup>177</sup> *Id.*

<sup>178</sup> Joseph Berger, *No Fines for Stores Displaying a Dress Code*, N.Y. TIMES (Jan. 21, 2014), [https://www.nytimes.com/2014/01/22/nyregion/no-fines-for-stores-displaying-a-dress-code.html?\\_r=0](https://www.nytimes.com/2014/01/22/nyregion/no-fines-for-stores-displaying-a-dress-code.html?_r=0) [https://perma.cc/6VDC-32B7].

<sup>179</sup> See Bloom, *supra* note 148, at 17. See also *id.* at 20–21.

<sup>180</sup> MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 5 (2012).

<sup>181</sup> Josh Morgan, *The Decline of Trust in the United States*, MEDIUM (May 20, 2014), <https://medium.com/@monarchjogs/the-decline-of-trust-in-the-united-states-fb8ab719b82a> [https://perma.cc/6ZT6-W669].

<sup>182</sup> GSS Data Explorer, *Can people be trusted*, NORC UNIV. CHICAGO (2017) <https://gssdataexplorer.norc.umd.edu/variables/441/vshow> [https://perma.cc/8VXW-HWCM].

a third of us still said the same.<sup>183</sup> By contrast, about two-thirds of Americans agreed with the statement, “You can’t be too careful in dealing with” others.<sup>184</sup> Younger Americans are less likely than older Americans to say they trust people.<sup>185</sup>

I have no way to know whether levels of social trust in America would be even lower without *doux commerce*. And I do not maintain that commerce itself has led to a decline in social trust in America, any more than that commerce itself has led to a rise in nationalism across the world. Classical liberalism generally is at a moment of crisis, both in the United States and abroad, and political pluralism seems at a breaking point.<sup>186</sup> The decline in social trust in America is surely bound up with that crisis, and no doubt reflects many factors including, as political scientists Roberto Foa and Yascha Mounk maintain, a loss of faith in democracy itself.<sup>187</sup> But the point of the *doux commerce* thesis is that commerce generates trust and reciprocity and makes people comfortable cooperating with strangers on mutually beneficial projects.<sup>188</sup> The evidence from the GSS suggests that is not happening in contemporary America<sup>189</sup>—or, if it is, it is happening to a disappointing degree.

### CONCLUSION

Ever since Carlyle, conservatives have dismissed liberal economics as the “dismal science.”<sup>190</sup> But that nickname is unfair. In fact, classical liberalism is profoundly optimistic, and the *doux commerce* thesis reflects that optimism. Allow people to trade with one another, it holds, and the results will be wealth, tolerance, pluralism, and a benign indifference to deep disputes that would

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<sup>183</sup> The figures are available at the General Social Survey website. *Id.*

<sup>184</sup> *See id.*

<sup>185</sup> George Gao, *Americans divided on how much they trust their neighbors*, PEW RES. CTR. FACT TANK (Apr. 13, 2016), <http://www.pewresearch.org/fact-tank/2016/04/13/americans-divided-on-how-much-they-trust-their-neighbors/> [https://perma.cc/JEY7-QMHV].

<sup>186</sup> *See supra* note 20 and accompanying text.

<sup>187</sup> *See* Foa & Mounk, *supra* note 158, at 16.

<sup>188</sup> *See* Oman, *Doux Commerce*, *supra* note 26, at 710.

<sup>189</sup> *Can people be trusted*, *supra* note 182.

<sup>190</sup> William Lucy, *Method and Fit: Two Problems for Contemporary Philosophies of Tort Law*, 52 MCGILL L.J. 605, 607, 607 n.1 (2007) (discussing origin of phrase).

otherwise divide us. The market is, to adapt James Russell Lowell's famous quote about the American Constitution, "a machine that would go of itself."<sup>191</sup> The law's role is to support the market and allow it to create its considerable political benefits. What could be more optimistic than that?

*The Dignity of Commerce* makes a great contribution to contracts scholarship, and I agree with many of the points it makes. To the extent the book's argument for the moral benefits of commerce relies on the *doux commerce* thesis, however, I think it too optimistic. This is the crux of my disagreement with Oman: I am more pessimistic than he about the market's political benefits. In fact, I will close with Oman's own observation about likely responses to his book. It is an observation with which I wholeheartedly agree:

To the extent that one is an optimist about the moral possibilities of markets, then one should be enthusiastic about the extension of contract law to govern larger swathes of human interaction. To the extent that one is more subdued in one's assessment of markets' moral value, then one's view of contract law's domain should be similarly limited.<sup>192</sup>

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<sup>191</sup> Laurence Tribe, *Bicentennial Blues: To Praise the Constitution or to Bury It?*, 37 AM. U.L. REV. 1, 5 (quoting Lowell) (internal quotations omitted).

<sup>192</sup> OMAN, *supra* note 1, at 18.